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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1769

STEVEN CHARLES SANDERS,
Petitioner,

vs.

KENNETH OLIVER AND KANSAS ATTORNEY GENERAL,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS TENTH CIRCUIT

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Respondents.

OPINION BELOW

Respondent is in substantial agreement with Petitioner's statement.

JURISDICTION

Respondent is in substantial agreement with Petitioner's statement.

QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner may challenge the veracity of statements made by an informant to the affiant, upon which an affidavit to establish probable cause was based.

2. Whether Petitioner has the right to litigate Fourth Amendment claims in the federal courts, after the issue has been fully litigated on the state level.

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent is in substantial agreement with Petitioner's statement.

STATEMENT OF THE CASE

Respondent is in substantial agreement with Petitioner's statement.

ARGUMENT FOR NOT GRANTING WRIT OF CERTIORARI

ISSUE: PETITIONER HAS NOT BEEN DENIED DUE PROCESS. TO THE CONTRARY, AS THIS HONORABLE COURT HAS HELD IN FRANKS V. DELAWARE, 438 U.S. 154 (1978), PETITIONER WAS PROVIDED THE OPPORTUNITY TO CHALLENGE THE TRUTHFULNESS OF THE AFFIANT.

Petitioner, Steven Charles Sanders, was convicted pursuant to the Uniform Controlled Substance Act, K.S.A. 65-4101, et seq., possession of marijuana with the intent to sell, based upon evidence obtained with a search warrant that was granted subsequent to the affidavit of Jack Hartman, Special Agent of the Attorney General's Office. It was alleged by Petitioner that certain statements made by Hartman were false and therefore the warrant should fail due to the lack of probable cause. Petitioner also alleges that certain statements by the informant, Mickey Harris, were false, however, petitioner was denied the opportunity to elicit testimony from one Eddie Stewart, in order to show Harris' statements as being false.

Respondents submit to this Honorable Court that petitioner's application for a writ of certiorari be denied, as the decision

of the Tenth Circuit Court in Sanders v. Oliver, et al., No. 78-1861 (10th Cir. 1979) is not in conflict with other decisions of this Court, but rather is in agreement. Clearly, petitioner was not denied due process in being denied the opportunity to challenge the veracity of the informant, Mickey Harris. On the other hand, the District Court of Wyandotte County, Kansas did allow petitioner the opportunity to challenge the affidavit in a manner consistent with this Court's subsequent decision in Franks v. Delaware, 438 U.S. 154, (1978). The Court's decision in Franks, however, did not extend to petitioner the right to challenge statements made by an informant, but only those statements made by the affiant. 438 U.S. at 171. Petitioner is not able to challenge statements made by an informant, as such statements do not go to the integrity of the affidavit or warrant, as the information "not being within the personal knowledge of the affiant did not go to the integrity of the affidavit." Rugendorf v. United States, 376 U.S. 528, 532 (1964).

Furthermore, it is the intention of the exclusionary rule and the Fourth Amendment to prevent police misconduct, not misconduct of a non-governmental informant: "The primary justification for the exclusionary rule then is the deterrence of police conduct that violates the Fourth Amendment rights. Post-Mapp decisions have established that the rule is not a personal constitutional right." Stone v. Powell, 428 U.S. 465, 486 (1976). Petitioner's claim of the denial of due process must fail then as this court has previously decided that statements made by an informant are not subject to an attack for a lack of truthfulness, as such statements are not within the scope of the Fourth Amendment nor the exclusionary rule.

Petitioner's claim of a denial of due process

by being denied the opportunity for a full evidentiary hearing to challenge the warrant must also fail as Franks precludes any such hearing as probable cause was determined to exist even after the affiant's false statements were struck.

> "[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally or with reckless disregard for the truth was included by the affiant in the warrant and affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that hearing be held at the defendant's request." Franks v. Delaware, 438 U.S. at 155, 156.
> [Emphasis supplied.]

In regard to the affidavit, petitioner incorrectly stated the remaining material, as the "attack" rule in Franks pertains only to those statements by an affiant, not a non-governmental informant. The correct version of the affidavit, minus any false statements by the affiant, should read:

> "That he has reason to believe that on the premises known as 35 South 15th Street (upstairs apt.) in the Wyandotte District of Kansas, there is now being concealed certain property, namely Cannabis Sativa L. (commonly known as Marijuana), Cocaine, and Heroin which are illegal for possession by the Uniform Controlled Substance Act, K.S.A. 65-4105.

> "And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: The assigning officer swears and affirms that he has information from a confidential informant, . . . that at the above address is secreted Heroin and Cocaine in one ounce lots and Marijuana in one pound lots. The confidential informant states that this is the residence of Steve Sanders, and he has purchased the above-mentioned items within the last 24 hours."

Therefore, petitioner is not entitled an evidentiary hearing as the remaining material in the affidavit supplies sufficient probable cause pursuant to this Court's decision in United States v. Harris, 403 U.S. 573, (1971). Probable cause is supplied by the affidavit as the informant, Mickey Harris, made incriminating statements of having purchased illegal drugs from the petitioner within the past twenty-four hours, and supplied detailed information to Hartman, in that the marijuana was kept in one pound lots and the heroin and cocaine was kept in one ounce lots secreted in petitioner's apartment.

> "Admissions of crime like admissions against proprietary interest, carry their own indicia of credibility sufficient at least to support a finding of probable cause to search. That the informant may be paid or promised a 'break' does not eliminate the residual risk and opprabium of having admitted criminal conduct." 403 U.S. at 583.

This Court has also held that the detailed information provided by the informant in Harris was a proper indicator of probable cause.

> "In determining what quantum of information is necessary to support a belief that an unidentified informant's information is truthful, Jones v. United States, supra, is a suitable benchmark. The affidavit in Jones recounted the tip of an anonymous informant who claimed to have recently purchased narcotics from the defendant at his apartment, and described the apartment in some detail." 403 U.S. at 580.

Therefore, since it is clear that there is probable cause to support the warrant, after the allegedly incorrect statements are removed, pursuant to the decision in Harris, it is also clear that petitioner has no right to any further evidentiary hearing to challenge the veracity of the affidavit or warrant pursuant to this Court's decision in Franks.

Furthermore, affiant's statements that were attached by petitioner do not appear to be vital to support probable cause. The section of the affidavit challenged as false, relates in relevant part: "Who he has known for several months, who has given him information in the past that has proven to be correct. . . ." (Petitioner's Brief p. 8). "[B]ut this court in Jones never suggested that an averment of previous reliability was necessary. Indeed where the inquiry is, as it always must be in determining probable cause, whether the informant's present information is truthful or reliable. . . ." United States v. Harris, 403 U.S. at 582. [Emphasis supplied by the Court.]

In addition, petitioner should be denied certiorari as this Court has held in Stone v. Powell, 428 U.S. 465 (1976), "where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search was introduced at his trial." 428 U.S. at 481.

In the case at bar, petitioner was allowed to challenge false statements made by the affiant, but was prohibited by introducing evidence to challenge the veracity of the informant in accord with the guidelines set down in Franks. Probable cause was found to exist by State District Court Judge Miller after discarding false statements made by the affiant.

> "And I believe that if I had been in Judge Meek's shoes and the same affidavit had been presented to me, that I would have found probable cause for issuing a warrant. And even with these facts, which you have stated to me were brought out in the record below, I'm not going to overrule the motion -- the warrant or the search on those grounds. I could be wrong but --." Petitioner's Brief A-3, A-4.

Therefore, as the issue of probable cause was considered by the District Court and decided in accordance with Harris, it is clear that Petitoner's claim was litigated in light of Stone, which cited Townsend v. Sain, 372 U.S. 293, 9 L.Ed.2d 770, 83 S.Ct. 745 (1963), as the standard in determining what fair and full litigation meant. "[I]f the prior state

hearing occurred in the course of the original trial, for example on a motion to suppress allegedly unlawful evidence . . . it will usually be proper to assume that the claim was rejected on the merits." 372 U.S. at 314. Therefore as Petitioner has had an opportunity to full and fair litigation on the issue on the state level, he should be precluded any federal review of his habeas corpus complaint pursuant to this Honorable Court's decision in Stone.

CONCLUSION

In closing, as this Honorable Court has previously decided the issues raised by Petitioner, adversely to his interests, the writ of certiorari should be denied. It has been decided by the Court in Franks v. Delaware, 438 U.S. 154, 57 L.Ed.2d 667, 98 S.Ct. 2674 (1978) that one could not challenge the statements of an informant, thereby eliminating the petitoner's claim of denial of due process. Furthermore, this Court has decided in Stone v. Powell, 428 U.S. 465, 49 L.Ed.2d 1067, 96 S.Ct. 3037 (1976), that once a state prisoner has had the opportunity to fully and fairly litigate any Fourth Amendment claim, he is precluded from seeking a habeas corpus action in the federal courts. Stone thus eliminates any claim of Petitoner as he has had the opportunity to fully and fairly litigate the issues, within the limits an affidavit may be attacked as set down in Franks v. Delaware, 438 U.S. 154 (1978). Therefore, as the Tenth Circuit decision Sanders v. Oliver, et al., is in agreement, not in conflict, with this Court's previous decisions, the writ of certiorari sought by petitioner should be denied.

Respectfully submitted,

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